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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 LARRY GENE HEGGEM,

10 Plaintiff,

11 v.

12 JOSEPH LOPIN, et al.,

13 Defendants.  
14

Case No. C11-2123-RSL-JPD

REPORT AND RECOMMENDATION

15 I. INTRODUCTION AND SUMMARY CONCLUSION

16 Plaintiff Larry Gene Heggem is currently incarcerated at the Stafford Creek Corrections  
17 Center, a prison operated by the Washington State Department of Corrections (“DOC”).  
18 Plaintiff is proceeding *pro se* in this 42 U.S.C. § 1983 civil rights action related to incidents that  
19 occurred when Plaintiff was incarcerated at the Monroe Corrections Complex, another DOC  
20 prison. Specifically, Plaintiff alleges that the Defendants, two DOC health care providers and  
21 one DOC guard, were deliberately indifferent to his serious medical needs in violation of his  
22 Eighth Amendment right to be free from cruel and unusual punishment, and that one Defendant  
23 used excessive force against him.

1 This matter comes before the Court on the Defendants' motion to dismiss. Dkt. 17. The  
2 Court, having considered the Defendants' motion to dismiss, Plaintiff's response, the governing  
3 law, and the balance of the record, recommends that the Defendants' motion, Dkt. 17, be  
4 GRANTED.

## 5 II. JURISDICTION

6 This Court has federal question jurisdiction over plaintiff's federal claims pursuant to 28  
7 U.S.C. § 1983. *See* 28 U.S.C. § 1331. The Court also has jurisdiction over all the parties in this  
8 case, as they are residents of Washington. Venue is proper in this district pursuant to 28 U.S.C.  
9 § 1391(b).

## 10 III. BACKGROUND

### 11 A. Factual Background

12 Plaintiff's amended complaint seeks monetary relief against several DOC employees for  
13 deliberate indifference to his medical needs starting in August 2011 and continuing to the present  
14 time. Dkt. 8 at 3. Specifically, Plaintiff alleges that Dr. Joseph Lopin failed to order MRI scans  
15 after Plaintiff received face and forehead wounds on November 30, 2011. *Id.* Plaintiff also  
16 alleges that Dr. William Collins wrongfully refused to prescribe a panic medication that Plaintiff  
17 requested. *Id.* Plaintiff alleges that he was injured on January 4, 2012, after Officer David Heise  
18 used excessive force against him, and Dr. Lopin again failed to order MRI scans or prescribe  
19 strong pain medication. *Id.* Lastly, Plaintiff alleges that Dr. Laura Manigo-Hedt wrongfully  
20 withheld certain medications despite Plaintiff's serious pain. *Id.*

21 During the time period between August 2011 and January 27, 2012, Plaintiff filed  
22 approximately 23 grievances with DOC via the Washington Offender Grievance Program  
23

1 (“OGP”) related to the medication concerns and excessive force alleged in Plaintiff’s complaint.<sup>1</sup>  
2 Specifically, Plaintiff filed twelve grievances alleging a denial of methadone or other opiate pain  
3 medications. *See* Dkt. 17, Ex. 1 Att. C, F, G, I, J, L, P, S, T, V, W, X<sup>2</sup>. Plaintiff filed eight  
4 grievances alleging a denial of klonopin. *See id.*, Att. B, D, F, G, I, L, O, P. Plaintiff filed three  
5 grievances alleging a denial of milk thistle. *See id.*, Att. E, K, Q.

6 Thirteen of these grievances were returned to Plaintiff unadjudicated because they  
7 exceeded the five-grievance maximum under the OGP. *See id.*, Att. D, F-H, J-L, R-W. Four  
8 more were returned unadjudicated because the grievances contained too many issues in one  
9 grievance form, in violation of OGP rules. *See id.*, Att. B, C, I, X. Each of these unadjudicated  
10 grievances was returned with a notice explaining how or what needed to be corrected. *See id.*,  
11 Att. B-D, F-I, J-L, W-X. Plaintiff either failed to resubmit the grievances, or simply resubmitted  
12 the original grievance without correction. *See id.*, Att. B & C. Another grievance was denied as  
13 time-barred. *See id.*, Att. M. One grievance related to Plaintiff’s lack of information about the  
14 medications he was taking, and though the records indicated that Plaintiff had been provided  
15 information in the past, the grievance was accepted and Plaintiff was provided with additional  
16 copies of the information. *See id.*, Att. N.

17 Four of Plaintiff’s grievances were filed properly and were addressed on their merits, and  
18 eventually denied. *See id.*, Att. E (grievance regarding lack of milk thistle and “medical pot”), O  
19 (grievance regarding lack of celexa and klonopin), P (grievance regarding lack of methadone,  
20 oxycodone, seroquel, and klonopin), Q (grievance regarding lack of milk thistle). As to one of

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21 <sup>1</sup> Under the OGP, an offender may file grievances challenging certain aspects of their confinement, but a  
22 grievance must be filed within twenty days after a grievable incident occurs. *See* Dkt. 17, Ex. 1 ¶¶ 4, 7. An  
offender cannot file more than five new grievances per calendar week, and is limited to five active grievances at any  
one time. *Id.* ¶ 8. The grievance procedure consists of four levels of review. *Id.* ¶ 6.

23 <sup>2</sup> The grievance contained in Attachment X also includes Plaintiff’s allegations related to excessive force.

1 these grievances (Attachment E), Plaintiff could have appealed the denial but did not; as to the  
2 other three grievances, Plaintiff did not appeal the denial until after this lawsuit was filed and the  
3 record reflects that the appeals have not yet been investigated or decided. *See id.*, Att. O, P, Q.

4 B. Procedural History

5 Plaintiff initiated this lawsuit on December 19, 2011. Dkt. 1. On January 3, 2012, this  
6 Court declined to serve Plaintiff's complaint due to several specified deficiencies. Dkt. 7.  
7 Plaintiff filed his amended complaint on January 17, 2012. Dkt. 8. Ten days later, the Court  
8 directed service of plaintiff's amended complaint. Dkt. 9.

9 The Defendants filed a motion to dismiss on March 16, 2012, arguing that, *inter alia*, the  
10 Plaintiff has failed to state a claim upon which relief can be granted because Plaintiff has failed  
11 to exhaust his administrative remedies. The Defendants also requested that the Court find this  
12 lawsuit to be duplicative and frivolous, and that it merits a "strike" under the Prison Litigation  
13 Reform Act ("PLRA") of 1995, 28 U.S.C. § 1915(g). Plaintiff filed a response in which he, *inter*  
14 *alia*, dismisses his claims against Defendant Laura Manigo-Hedt but otherwise contends that he  
15 was unable to exhaust his administrative remedies with regard to the grievances at issue because  
16 he had already reached his five-grievance maximum. *See* Dkt. 18. The Defendants did not file a  
17 Reply Brief.

18 IV. DISCUSSION

19 A. Legal Standards

20 1. Motions to Dismiss

21 To withstand a motion to dismiss for failure to state a claim under Federal Rule of Civil  
22 Procedure 12(b)(6), a plaintiff must plead facts that state a facially plausible claim for relief.  
23 *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). Dismissal

1 is appropriate ‘if “there is no cognizable legal theory or an absence of sufficient facts alleged to  
2 support a cognizable legal theory.”’ *Id.* (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.  
3 2001)).

## 4 2. The PLRA’s Exhaustion Requirement

5 The PLRA provides that “No action shall be brought with respect to prison conditions  
6 under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail,  
7 prison, or other correctional facility until such administrative remedies as are available are  
8 exhausted.” 42 U.S.C. § 1997e(a). *See also Jones v. Bock*, 549 U.S. 199, 211-12 (2007) (“There  
9 is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot  
10 be brought in court.”). The PLRA does not define “prison conditions,” but the Supreme Court  
11 has held that “the PLRA’s exhaustion requirement applies to all inmate suits about prison life,  
12 whether they involve general circumstances or particular episodes, and whether they allege  
13 excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

14 Exhaustion under the PLRA must be “proper.” *Woodford v. Ngo*, 548 U.S. 81, 90-93  
15 (2006). In order to properly exhaust, a prisoner must comply with a prison’s grievance  
16 procedures. *Jones*, 549 U.S. at 218; *Woodford*, 548 U.S. at 90-91. This includes “compliance  
17 with [a prison’s] deadlines and other critical procedural rules because no adjudicative system can  
18 function effectively without imposing some orderly structure on the course of its proceedings.”  
19 *Woodford*, 548 U.S. at 90-91. *Accord Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009)  
20 (proper exhaustion “means that a grievant must use all steps the prison holds out, enabling the  
21 prison to reach the merits of the issue.”).

22 The Ninth Circuit has further clarified that exhaustion of administrative remedies is a pre-  
23 condition to filing a lawsuit: if a claim was not exhausted *before* the lawsuit is filed, the claim

1 must be dismissed. *See McKinney v. Carey*, 311 F.3d 1198, 1200-01 (9th Cir. 2002).

2 B. Plaintiff has Failed to Exhaust His Administrative Remedies as Required by the PLRA

3 As described above, Plaintiff has filed 23 grievances related to the allegations included in  
4 his amended complaint. Most of these grievances were not adjudicated and returned to Plaintiff  
5 because they did not comply with OGP rules. *See* Dkt. 17, Ex. 1 at Att. B-D, F-M, R-X. Though  
6 Plaintiff had the opportunity to correct the deficiencies and resubmit, he either did not do so or  
7 simply resubmitted the same grievance. *See id.*, Att. B &C.

8 Four of Plaintiff's grievances related to alleged denial of medication were filed properly  
9 and were addressed on their merits and ultimately denied. Those grievances address the  
10 Defendants' denial of milk thistle, "medical pot," celexa, klonopin, methadone, oxycodone, and  
11 seroquel. *See id.*, Att. E (grievance denied on September 26, 2011), O (grievance denied on  
12 February 8, 2012), P (grievance denied on February 8, 2012), Q (grievance denied on February  
13 8, 2012). At the time that Plaintiff filed this lawsuit, he had not appealed the denial of these  
14 grievances. He appealed the three grievances denied on February 8, 2012, weeks after this  
15 lawsuit was filed on December 19, 2011. Plaintiff's additional submissions attached to his  
16 response are consistent with this timeline. *See* Dkt. 18, Exs. A-G. Because Plaintiff had not  
17 exhausted his administrative remedies with regard to these denied grievances at the time he filed  
18 the lawsuit, the claims related to the medication-related grievances must be dismissed. *See*  
19 *McKinney*, 311 F.3d 1200-01.

20 Plaintiff's only grievance related to Defendant Heise's alleged use of excessive force was  
21 received by DOC on January 5, 2012. *See* Dkt. 17, Ex. 1 at Att. X (alleging that Plaintiff had  
22 been injured by Defendant Heise and needed an MRI and pain medication). This grievance was  
23 returned to Plaintiff on January 6, 2012, with instructions that it needed to be rewritten to comply

1 with OGP rules and resubmitted within five days. *Id.* The record reflects that Plaintiff did not  
2 correct and re-file, and thus this grievance remains unexhausted. As such, it must be dismissed.  
3 *See McKinney*, 311 F.3d 1200-01.

4        Though the Defendants request that the Court dismiss Plaintiff's unexhausted claims with  
5 prejudice, given that the deadline to appeal the unexhausted grievances has passed for most of  
6 the grievances, the Defendants do acknowledge that the Plaintiff is in the process of pursuing  
7 appeals as to some of the grievances filed or denied after Plaintiff filed this suit. Dkt. 17 at 12.  
8 Under these circumstances, the Court finds that dismissal without prejudice would be appropriate  
9 to allow Plaintiff to exhaust. *See McKinney*, 311 F.3d at 1200-01 (explaining that dismissal  
10 without prejudice for failure to exhaust serves the PLRA's objectives).

11 C.    This Suit is Frivolous and Duplicative, and Constitutes a "Strike" Under the PLRA


12        Plaintiff's claims in this lawsuit include allegations that Defendants Lopin and Manigo-  
13 Hedt were deliberately indifferent to his medical needs when they denied him MRI scans,  
14 methadone, klonopin, and milk thistle. Plaintiff previously filed a lawsuit alleging those same  
15 facts and raising the same claims, and that suit is currently pending before the Honorable Ronald  
16 B. Leighton in this District. *See Heggem v. MCC*, Case No. C11-5985-RBL-KLS (initiated  
17 November 30, 2011). In his response to Defendants' motion to dismiss this case, Plaintiff  
18 indirectly acknowledges the overlap of facts between his lawsuits, referring to documents filed in  
19 the record of Judge Leighton's case regarding his arguments in this case. Dkt. 18.

20        The Court agrees with Defendants that under these circumstances, this lawsuit is  
21 frivolous because it is duplicative and represents an attempt to abuse the judicial process.  
22 Accordingly, the Court recommends that the dismissal of this suit should be considered a  
23 "strike" under the PLRA, 28 U.S.C. § 1915(g).

1 V. CONCLUSION

2 For the reasons discussed above, the Court recommends that the Defendants' motion to  
3 dismiss, Dkt. 17, be GRANTED, and this case be DISMISSED without prejudice, and that such  
4 dismissal shall constitute a "strike" for purposes of the PLRA. A proposed order accompanies  
5 this Report and Recommendation.

6 DATED this 24th day of April, 2012.

7   
8 JAMES P. DONOHUE  
9 United States Magistrate Judge